



STATE OF CALIFORNIA  
FAIR POLITICAL PRACTICES COMMISSION  
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April 26, 2022

Celeste Stahl Brady  
Stradling Yocca Carlson & Rauth  
660 Newport Center Drive, Suite 1600  
Newport Beach, CA 92660

Re: Your Request for Advice  
**Our File No. A-22-027**

Dear Ms. Brady:

This letter responds to your request for advice on behalf of South Gate City Councilmember Gil Hurtado regarding the conflict of interest provisions of the Political Reform Act (the “Act”) and Government Code Section 1090, et seq.<sup>1</sup>

Please note that we are only providing advice under the conflict of interest provisions of the Act and Section 1090, and we are not providing advice under other general conflict of interest prohibitions such as common law conflict of interest. Also, note that we are not a finder of fact when rendering advice (*In re Oglesby* (1975) 1 FPPC Ops. 71), and any advice we provide assumes your facts are complete and accurate. If this is not the case or if the facts underlying these decisions should change, you should contact us for additional advice.

We are required to forward your request regarding Section 1090 and all pertinent facts relating to the request to the Attorney General’s Office and the Los Angeles County District Attorney’s Office, which we have done. (Section 1097.1(c)(3).) We did not receive a written response from either entity. (Section 1097.1(c)(4).) We are also required to advise you that, for purposes of Section 1090, the following advice “is not admissible in a criminal proceeding against any individual other than the requestor.” (See Section 1097.1(c)(5).)

### QUESTION

Under the Act or Section 1090, does City of South Gate (“City”) Councilmember Hurtado have a prohibited financial interest in the decision to award a contract for the City’s waste hauling services, where he resides in a mobile home and has a month-to-month lease on a lot space located less than 500 feet from a composting facility operated by one of the bidders that will potentially receive increased waste as a result of the contract?

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<sup>1</sup> The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18104 through 18998 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

## CONCLUSION

Yes. While his month-to-month lot space lease does not meet the definition of a real property financial interest under the Act, Councilmember Hurtado has a financial interest in his personal finances related to his ownership of his mobile home. Pursuant to Regulation 18702.5(a), it is reasonably foreseeable that the decision may have a material financial impact on the value of his mobile home. Under the Act, he may not participate in the decision. Additionally, to the extent he has a prohibitive financial interest under Section 1090, the rule of necessity permits the City Council to consider and enter the City's waste hauling services contract so long Councilmember Hurtado recuses himself from the decisions.

## FACTS AS PRESENTED BY REQUESTER

Councilmember Hurtado is a retired postal worker who owns a mobile home as his personal property and leases the mobile home's lot space from the mobile home park owner. His current lease is a month-to-month tenancy.

The City recently issued a request for bids to obtain city-wide waste hauling services. This includes residential trash pick-up. The City received three bids. Universal Waste Systems ("UWS") is one of the three bidders. It's affiliate entity, Green Wise Soil, operates a composting facility, the Green Waste Recycling Center on property owned by the City. This facility is located approximately 372 feet from the boundary of the mobile home park lot space where Councilmember Hurtado's mobile home is located. The Green Waste facility currently handles green waste delivered to the facility for composting for its customers located both within and outside the City boundaries. UWS is not the current citywide waste hauler under contract with the City.

In response to our request for additional information, the City states that if UWS is selected as the City's new trash hauler, one could presume that there will be increased activity at its Green Waste site as it is the only site UWS operates within the City. An increase in activity would likely result in additional truck traffic, potential additional noise from increased operation and the risk of additional particulates floating over the nearby/adjacent Los Angeles River into Councilmember Hurtado's outside yard area and the park's common areas. The City does not believe that truck traffic would increase directly in front of the mobile home park but would increase nearby. Also, it's not clear whether UWS has existing infrastructure to service the contract, if selected, or whether additional capital investment would need to be made at the facility.

In response to our request for additional information regarding possible impacts on the Councilmember's mobile home's value, the City states that the additional activities have the potential to impact the quiet enjoyment and beneficial use of the lot space at the mobile home park. It is your experience in dealing with mobile home park closures that while the value is largely determined by the type, size, quality, and condition of the mobile home, the logistics and expense of a move is a factor in determining a mobile home's resale value.

## ANALYSIS

### *The Act*

Section 87100 prohibits any public official from making, participating in making, or otherwise using his or her official position to influence a governmental decision in which the official has a financial interest. A public official has a “financial interest” in a governmental decision, within the meaning of the Act, if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on one or more of the public official’s interests. (Section 87103; Regulation 18700(a).)

Relevant to these facts, Section 87103 of the Act lists several types of financial interests that can give rise to a conflict of interest, including:

- An economic interest in real property in which the official has a direct or indirect interest of \$2,000 or more. (Section 87103(b); Regulation 18702.2.)
- An economic interest in the official’s personal finances, including those of the official’s immediate family. (Section 87103; Regulation 18702.5.)

The first issue we address is whether the Councilmember has a real property financial interest under the Act, and if not, whether he has a personal financial interest.

Section 82003 defines an “interest in real property” to include a leasehold if the market value is \$2,000 or more. However, Regulation 18233 excludes the interest of a tenant in a month-to-month lease from the definition of an “interest in real property” and that of a “leasehold interest.” Therefore, Councilmember Hurtado does not have a “real property” interest under Section 87103. However, he does have an interest in his personal finances in regard to his mobile home owned as his personal property. We next examine whether there will be a reasonably foreseeable and material financial effect on his mobile home interest as a result of the decision.

### *Foreseeability and Materiality*

Regulation 18700(c)(5) states that a “financial effect” means “an effect that provides a benefit of monetary value or provides, prevents, or avoids a detriment of monetary value.” A financial effect is presumed reasonably foreseeable where the official’s financial interest is explicitly involved as a named party in, or subject of, the decision. (Regulation 18701(a).)<sup>2</sup> Where, as the facts indicate here, the financial interest is neither a party to nor the subject of the decision, the financial effect is reasonably foreseeable if it can be recognized as a realistic possibility, more than hypothetical or theoretical. (18701(b).)

Regulation 18702.5(a) states that a governmental decision’s reasonably foreseeable financial effect on a public official’s financial interest in personal finances is material “if the decision may result in the official receiving a financial benefit or loss of \$500 or more in any 12-month period

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<sup>2</sup> A financial interest is the subject of a proceeding if the decision involves the issuance, renewal, approval, denial, or revocation of any license, permit, or other entitlement to, or contract, with the financial interest, including any decision affecting a property interest as described in Regulation 18702.2(a)(1)-(6). (Regulation 18701(a).)

due to the decision.” Due to the close proximity of the mobile home to the Green Waste facility and the prospect that the facility may experience an increase in activity, causing an increase in noise, traffic, and airborne particulate matter in the nearby area where the mobile home is located, it is reasonably foreseeable that the contract decision may result in a financial loss of \$500 or more in regard to the value of Councilmember Hurtado’s mobile home. Therefore, he has a prohibitive financial interest in the decision and may not participate.

### *Section 1090*

This matter involves the making of a contract between the City and a selected waste hauling contractor. Section 1090 generally prohibits public officers, while acting in their official capacities, from making contracts in which they are financially interested. Section 1090 is concerned with financial interests, other than remote or minimal interests, that prevent public officials from exercising absolute loyalty and undivided allegiance in furthering the best interests of their agencies. (*Stigall v. City of Taft* (1962) 58 Cal.2d 565, 569.) Under Section 1090, “the prohibited act is the making of a contract in which the official has a financial interest.” (*People v. Honig* (1996) 48 Cal.App.4th 289, 333.) A contract that violates Section 1090 is void, regardless of whether the terms of the contract are fair and equitable to all parties. (*Thomson v. Call* (1985) 38 Cal.3d 633, 646-649.) Significantly, when Section 1090 is applicable to one member of a governing body of a public entity, the prohibition cannot be avoided by having the interested board member abstain; the entire governing body is precluded from entering into the contract. (*Id.* at pp. 647-649.)

Although Section 1090 does not specifically define the term “financial interest,” case law and Attorney General opinions state that prohibited financial interests may be indirect as well as direct, and may involve financial losses, or the possibility of losses, as well as the prospect of pecuniary gain. (*Thomson v. Call*, *supra*, at pp. 645, 651-652; see also *People v. Vallerga* (1977) 67 Cal.App.3d 847, 867, fn. 5; 85 Ops.Cal.Atty.Gen. 34, 36-38 (2002); 84 Ops.Cal.Atty.Gen. 158, 161-162 (2001).) Furthermore, case law and statutory exceptions to Section 1090 make clear that the term “financially interested” must be liberally interpreted. It cannot be interpreted in a restricted and technical manner. (*People v. Gnass* (2002) 101 Cal.App.4th 1271, 1298.)

### *Rule of Necessity*

In limited cases, the “rule of necessity” exception has been applied to allow the making of a contract that Section 1090 would otherwise prohibit. (*Eldridge v. Sierra View Hospital Dist.* (1990) 224 Cal.App.3d 311, 322.) The rule has been applied where public policy concerns authorize the contract and “ensures that essential government functions are performed even where a conflict of interest exists.” (*Ibid.*, See also 69 Ops.Cal.Atty.Gen. 102, 109 (1986); (88 Ops.Cal.Atty.Gen. 106, 110 (2005).) “The rule of necessity permits a government body to act to carry out its essential functions if no other entity is competent to do so ...” (*Lexin v. Super. Ct.* (2010) 47 Cal.4th 1050, 1097.)

Under this rule, contract can be executed even though it would otherwise violate the terms of Section 1090. The “rule of necessity” has been applied in at least two specific types of situations: where the contract is for essential services and no source other than the one that triggers the conflict is available; and where the official or board is the only one authorized to act. (69 Ops.Cal.Atty.Gen. 102,109 (1986).)

Here, the City must be permitted to consider the bidders and enter into contract for the City's waste hauling services in order that it may properly carry out its essential function, to secure a waste hauling service for the City. The City, as one party to the contract, is the only body authorized to act. Accordingly, we find that the rule of necessity applies and permits the City to enter into the eventual waste hauling services contract.

When the rule of necessity applies to a member of a multi-member board, the Attorney General's Office has determined that the interested board member must abstain from any participation in the decision. (See 89 Ops.Cal.Atty.Gen. 217 (2006).) In addition, note that participation in the making of a contract is defined broadly as any act involving preliminary discussions, negotiations, compromises, reasoning, planning, drawing of plans and specifications, and solicitation for bids. (*Millbrae Assn. for Residential Survival v. City of Millbrae* (1968) 262 Cal.App.2d 222, 237.)

Under the facts presented it is unnecessary to further consider whether Councilmember Hurtado has an interest in the contract for purposes of Section 1090. Even to the extent that he does, he is prohibited from taking part in the decision under the Political Reform Act and the rule of necessity would permit the remaining councilmembers to consider and enter the City's waste hauling services contract so long Councilmember Hurtado recuses himself from the decisions. We note that because Councilmember Hurtado has a conflict of interest under the Act, he must additionally comply with the recusal requirements in Section 87105, including publicly identifying the financial interest, recusing himself from the proceeding and leaving the room until after the discussion, vote, or any other disposition of the matter is concluded.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Dave Bainbridge  
General Counsel

*L. Karen Harrison*

By: L. Karen Harrison  
Senior Counsel, Legal Division

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